87-1481

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**REECE MORREL, DONALD HERROLD AND J. CHARLES SHELTON,**
**Petitioners**

*v.*

**TRINITY BROADCASTING CORP., A MICHIGAN CORPORATION**
**Respondent**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

**Rule 54(b) of the** *Federal Rules of Civil Procedure* provides that where there are multiple parties or multiple claims in an action, a judgment disposing of one or more but fewer than all claims or parties is not final for purposes of appeal unless the trial court makes an express determination that there is no just reason for delaying appeal. The court of appeals found that this rule applies to consolidated actions, but limited its holding to prospective application only. The questions presented are:

1. Whether the court of appeals has jurisdiction to hear the present matter without Rule 54(b) certification that the summary judgment order in one of two consolidated cases is final for purposes of appeal.

2. Whether the court of appeals may limit its jurisdictional ruling to prospective application only, in spite of this Court's contrary holding in *Firestone Tire & Rubber v. Risjord*, 449 U.S. 368 (1981).

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OTHER AUTHORITIES

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**REECE MORREL, DONALD HERROLD AND J. CHARLES SHELTON,**
**Petitioners**

*v.*

**TRINITY BROADCASTING CORP., A MICHIGAN CORPORATION**
**Respondent**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

Reece Morrel, Donald Herrold and J. Charles Shelton petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit rendered August 26, 1987, rehearing and suggestion for rehearing en banc denied December 9, 1987, holding that an order of the United States District Court for the Northern District of Oklahoma was final for purposes of appeal, although future such orders would not be final.

## OPINIONS BELOW

The opinion of the United States Court of Appeals in its original decision (App. A, *infra*), is reported at 827 F.2d 673. The opinion of the United States Court of Appeals in its denial of the Petition for Rehearing and Suggestion for Rehearing En Banc (App. B, *infra*), is reported at 835 F.2d 245. The Order of the United States District Court (App. C, *infra*), is not reported.

## JURISDICTION

The jurisdiction of the federal district court was invoked under 28 U.S.C. § 1332(a). The decision of the court of appeals was entered on December 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This case is of imperative public importance because the court of appeals is proceeding in this matter in spite of its own finding that it is without jurisdiction, since the order appealed from is not final. The court of appeals announced in the opinion below that finality is "discretionary," and a lack of subject matter jurisdiction is not an absolute bar to appeal in light of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions are set forth in App. D, *infra*.

## STATEMENT OF THE CASE

1. Respondent, Trinity Broadcasting Corporation (Appellant below), initially brought an action in the United States District Court against Lee R. Eller and Leeco Oil Company. Subsequently, Trinity Broadcasting filed another action in the same court against Reece Morrel, Donald Herrold and J.

Charles Shelton, Petitioners herein. Although Trinity Broadcasting could have joined all defendants in one action, it failed to do so. On December 3, 1983, the Honorable H. Dale Cook granted Trinity Broadcasting's motion to consolidate the two actions for all purposes.

2. On April 25, 1986, Judge Cook granted summary judgment in favor of Morrel, Herrold and Shelton. The order sustaining their motion for summary judgment was entered on the docket on April 29, 1986. Subsequently, Trinity Broadcasting filed a motion for rehearing which was denied June 27, 1986.

3. Trinity Broadcasting purported to commence its appeal by filing a notice of appeal on July 23, 1986. No judgment had been rendered terminating the proceedings against Lee R. Eller or Leeco Oil Company, and the action was still pending as to those parties in the trial court.

4. On August 14, 1986, the trial court certified the order as final pursuant to Rule 54(b) of the *Federal Rules of Civil Procedure*, stating that there was no just reason for delay of the appeal. Trinity Broadcasting failed to file a new notice of appeal after the Rule 54(b) order was entered.

5. In its August 26, 1987, opinion, the Tenth Circuit held that a judgment is not final without Rule 54(b) certification where consolidated claims remain to be determined. Because this ruling would deprive the court of jurisdiction in the present matter, however, the court of appeals limited this holding to prospective application only.

6. In their Petition for Rehearing and Suggestion for Rehearing En Banc, Morrel, Herrold and Shelton stated that the prospective limitation of the holding is directly contrary to the ruling of this Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 369 (1981). In *Firestone*, this Court stated:

"By definition, a jurisdictional ruling may never be made prospective only." *Id.* at 379.

7. The Tenth Circuit interpreted *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), as modifying this absolute rule, and so on December 9, 1987, the Petition for Rehearing and Suggestion for Rehearing En Banc were denied.

## REASONS FOR GRANTING THE WRIT

### I.

### The Tenth Circuit has exceeded the jurisdictional limitations of Article III by claiming discretion to waive the finality requirements of Rule 54(b) in order to preserve the appeal.

Through the authority of Article III of the United States Constitution, Congress has determined that the federal courts of appeals shall, with certain narrowly delineated exceptions, have jurisdiction to review only final decisions of the district courts. *See* 12 U.S.C. § 1291. Rule 54(b) of the *Federal Rules of Civil Procedure* limits what orders may be final and appealable. That rule states in pertinent part:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such a determination . . . any order or other form of decision, however designated, . . . shall not terminate the action as to any of the claims or parties.

The issue before the Tenth Circuit below and before this Court on review is whether actions that were initially separate but subsequently consolidated in the trial court constitute "an action" governed by the quoted provision of Rule 54(b). Petitioners herein submit that such consolidated actions are controlled by Rule 54(b), and that the court of appeals is therefore without jurisdiction to review a summary judgment order disposing of one or more but fewer than all claims until such order has been certified as final by the district court.

This is an important jurisdictional issue arising frequently in the circuit courts of appeals. Seven circuits have addressed this issue and have formed three different conclusions. This particular case urgently requires the attention of this Court, because unlike the other circuits which have simply disagreed as to the applicability of Rule 54(b), the Tenth Circuit has held that application of the rule is subject to the "discretion" of the appellate courts.

### A. Separate Actions Consolidated for all Purposes Become "An Action" Governed by Rule 54(b).

Consolidation is governed by Rule 42(a) of the *Federal Rules of Civil Procedure* which provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The wording and structure of Rule 42(a) strongly suggest that consolidation is not confined to ordering that all hearings and trial of all issues in the actions be joint, but also permits complete consolidation of the actions themselves. As noted by

the Fifth Circuit in *Ringwald v. Harris*, 675 F.2d 768, 770, n. 4 (5th Cir. 1982), the first clause of the rule does not speak of consolidation; and what it authorizes to be made "joint" is the hearing or trial of any or all of the issues, not the actions themselves: However, under the second clause it is the "actions" which are ordered "consolidated." The third clause authorizes ordering proceedings so as to avoid unnecessary delay or costs. Presumably, the second clause grants some consolidating power not covered by the first and third. *Id.* at 770, n. 4. *See also* 9 Wright & Miller, *Federal Practice & Procedure* § 2382 (1981), for the view that the wording of Rule 42(a) suggests that there are distinctly different kinds of "consolidation."

The language of Rule 42(a) indicates an intent that the district court shall have the authority to consolidate separate actions into "an action" within the meaning of Rule 54(b). This is the most natural interpretation of Rule 42(a) and the one that gives the greatest practical effect to Rule 54(b). This interpretation is also implied by the statement in the advisory committee notes to Rule 42: "For the entry of separate judgments, see Rule 54(b)." *Accord Ringwald v. Harris*, 675 F.2d 768, 770 (5th Cir. 1982).

### B. The Purposes of Rule 54(b) Will be Thwarted by Failure to Include Consolidated Actions Within its Control.

The original Rule 54(b) provided no guidance as to what constituted a "final order."

> The result was that the jurisdictional time for taking an appeal from a final decision on less than all of the claims in a multiple claims action in some instances expired earlier than was foreseen by the losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of ap-

pellate proceedings was undesirably increased.

*Sears Roebuck & Company v. Mackey*, 351 U.S. 427, 434 (1956).

The current rule provides a bright line test by which litigants may gauge whether a decision is final for purposes of appeal. This prevents appeals from being lost by a litigant's mistaken belief that the judgment is not final and consequent failure to file a notice of appeal. It also prevents premature filing of a notice of appeal with the consequent waste of the time and resources of the court and the litigants. The current rule also grants the district court right to decide the finality of its own order. Thus, appeal is allowed in appropriate cases but without requiring the circuit court to determine the finality of each order and without disrupting the proceeding in the district court. All of these considerations of Rule 54(b) are as applicable to consolidated actions as to an action containing multiple parties or claims from the outset.

With consolidated cases, however, there is also the additional consideration that the district court, in exercising its broad discretion to order consolidation of actions presenting a common issue of law or fact under Rule 42(a), weighs the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause. An appeal prior to the conclusion of the entire action could well frustrate the purpose for which the cases were originally consolidated. Not only could it complicate matters in the district court, but it could also cause an unnecessary duplication of efforts in the appellate court.

This should not be construed as hampering a litigant's right to appeal. Rather, it merely delays appeal until the order is final. In those cases where a litigant may be prejudiced by delay, the

district court may certify the order under Rule 54(b) as final for immediate appeal.

### C. Finality Should be Interpreted in a Practical Rather Than a Technical Manner.

This Court has held that the rule of finality must be interpreted in a practical rather than a technical manner. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). To hold that an action does not come within Rule 54(b) simply because of the chance fact that the claims were consolidated rather than originally brought together is to determine finality in a highly technical manner. The far more practical interpretation is that the bright line test of Rule 54(b) applies to any action involving multiple claims or parties regardless of the technical manner in which those parties or claims became joined.

This Court has also announced, "Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms for which Congress has expressed its wishes.' " *Palmore v. U.S.*, 411 U.S. 389, 396 (1973), quoting *Cheng Fan Kwok v. INS*, 291 U.S. 206, 212 (1968). In Rule 54(b), Congress has expressed its wish that the determination of whether an order is final be decided by the district court, since it is the district court that is in the best position to make that determination. Congress has further indicated a wish that the time and resources of the appellate courts and the litigants not be wasted pursuing appeals of nonfinal orders. Therefore, Congress designed a bright line test by which such finality could be determined. Congress' objectives should not be thwarted on the ground that a consolidated action may be technically somewhat different than an action with claims joined from the start.

**D. The Language of Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933), Does Not Apply to the Present Matter.**

In addressing this issue, several circuit courts have considered the statement in *Johnson v. Manhattan Ry. Company*, 289 U.S. 479, 496-97 (1933): "Consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *See, e.g., Ringwald v. Harris*, 675 F.2d 768, 770 (5th Cir. 1982); *In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 441 (1st Cir. 1972); *Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 929 (7th Cir. 1983).

The Court of Appeals for the Fifth Circuit noted, "*Johnson* predated the rules of civil procedure and the Court did not have before it any issue relating to the finality or completeness required of a judgment as a predicate for appeal. Moreover, the precise nature of the consolidation ordered in *Johnson* is not clear." *Ringwald v. Harris*, 675 F.2d 768, 770 (5th Cir. 1982). *Accord Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 929, n. 1 (7th Cir. 1983).

While a consolidation may not in every respect merge separate actions into a single suit, there is no reason why a proper consolidation may not cause otherwise separate actions to thenceforth be treated as a single judicial unit for purposes of Rule 54(b) when the consolidation is, as in the present case, for all purposes, requested by the plaintiff, and the actions could have originally been brought in a single suit. *Accord Ringwald v. Harris*, 675 F.2d 678, 771 (5th Cir. 1982).

## II.

**The nation's Courts of Appeals are sharply divided into three main groups over the important and frequently recurring jurisdictional question of the finality of a judgment on one of a group of consolidated claims.**

The question of whether a judgment in a consolidated action that does not dispose of all claims may be final without certification pursuant to Rule 54(b) of the *Federal Rules of Civil Procedure* has proven to be an uncommonly controversial issue. The seven circuit courts of appeals which have addressed this issue have divided into three main groups with sharply differing conclusions. The first group consists of those circuits which have concluded that each of the consolidated cases is a separate action and, therefore, a judgment in one of the actions is necessarily a final judgment appealable without a Rule 54(b) certification. This position has been adopted by the First and Sixth Circuits. *See In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 442 (1st Cir. 1972); *Accord Kraft, Inc. v. Local Union 327, Teamsters*, 683 F.2d 131, 133 (6th Cir. 1982). This is also the position implicitly adopted by the Tenth Circuit in its opinion in the present case.

Taking the opposite view is the Ninth Circuit which has concluded that a judgment in any consolidated action is *never* final without Rule 54(b) certification where claims remain pending in the trial court. *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984).

The third group falls within these two extremes. The position adopted by the Third, Fifth and Seventh Circuits is that the court of appeals should consider the extent and purpose of the consolidation and the relationship of the consolidated actions to determine the applicability of Rule 54(b). *See Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 930 (7th Cir. 1983);

*Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982); *Jones v. Den Norske Amerikalinje A/S*, 451 F.2d 985, 986-87 (3d Cir. 1971).

Although the circuit courts are divided three ways on this issue, only those circuits adhering to the extreme position that Rule 54(b) has no bearing on a consolidated action would assert jurisdiction to review an order such as that in the present case. In the present case, the claims were all brought by a single plaintiff. That plaintiff could have brought all the claims in one action but failed to do so. On the plaintiff's own motion, the district court consolidated the actions for all purposes. Thus, even those courts somewhere in between the two extremes would find that Rule 54(b) operates to bar the appeal in the present matter.

Petitioners submit that there are few issues more central to the concept of the limited jurisdiction of the federal courts than the issue here presented before this Court. The fact that seven courts of appeals are almost equally divided over such a significant constitutional issue as finality indicates that this is a subject urgently requiring review by this Court.

## III.

## The decision of the Tenth Circuit is directly contrary to the ruling of this Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 369 (1981).

In its original opinion, *Trinity Broadcasting Corp. v. Eller*, 827 F.2d 673 (10th Cir. 1987) ("*Trinity I*"), the court stated:

> We agree with the Ninth Circuit's approach and adopt the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final appealable judgment under 28 U.S.C. § 1291. To obtain review of one part of a consolidated action, ap-

> pellant must obtain certification under Fed. R. Civ. P. 54(b).

*Id.* at 675.

The court next announced, however:

> Since plaintiff did not file a second notice of appeal following the district court's Rule 54(b) certification, our dismissal of this appeal would result in no hearing for plaintiff on the merits. Retroactive application of this rule thus would work a substantial inequity on the plaintiff. We decline to do so.

*Id.*

This was challenged in a Petition for Rehearing and Suggestion for Rehearing En Banc as limiting a jurisdictional ruling to prospective application only in violation of this Court's holding in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). In *Firestone*, the United States Court of Appeals for the Eighth Circuit had held that orders denying motions to disqualify counsel are not appealable final decisions. Because it was overruling prior cases, however, the Eighth Circuit made its decision prospective only and reached the merits of the challenged order. The Supreme Court reversed, finding that the Eighth Circuit was correct in its finding that there was no appealable final order, but that the Eighth Circuit could not limit its holding to prospective cases only. The Court said:

> This approach, however, overlooks the fact that the finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.

*Id.* at 379.

In its opinion on the Petition for Rehearing and Suggestion for Rehearing En Banc, the Tenth Circuit stated that *Firestone* was not applicable because the decision in the present case was merely a "prudential holding" "far from being 'jurisdictional' and subject to Article III limitations." *Trinity Broadcasting v. Eller*, 835 F.2d 245, 248 (10th Cir. 1987) ("*Trinity II*"). After noting that the district court has the power to determine finality, the court stated:

> The courts of appeal likewise enjoy the power to establish and apply flexible rules of finality. Such power is exemplified by three decisions cited in *Trinity I* in which other circuits contemplated the finality of partial summary orders in consolidated cases. *Ivanov-McPhee v. Washington National Insurance Co.*, 719 F.2d 927, 930 (7th Cir. 1983); *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982); *Jones v. Den Norske Amerikalinje A/S*, 451 F.2d 985, 986-87 (3d Cir. 1971).

*Id.*

In sum, the opinion of the Tenth Circuit is that it has "discretionary power over finality determinations," so that its decision is nothing more than "rulemaking" for the circuit. *Id.*

This betrays a fundamental misunderstanding of both the finality requirement and the nature of the cited circuit court opinions. Contrary to the position of the Tenth Circuit, no court, not even the district court, has the discretion to create finality. The district courts are not empowered to grant Rule 54(b) certification to those orders that are not inherently final. Thus, the district court, while enjoying some measure of discretion, does not have discretion to create finality.

The circuit courts are even more limited since finality is a direct limitation upon their jurisdiction. The circuit opinions

cited by the Tenth Circuit do not, as suggested, retain some "discretionary power over finality determinations." In *Ringwald*, the Fifth Circuit flatly states that Rule 54(b) applies to those actions which, like the present action, could have been brought at one time. Similarly, the Third Circuit in *Den Norske* found that Rule 54(b) does not apply where the actions are *not* consolidated for all purposes, but only for trial. Neither of these courts reserve for themselves any discretionary power to create finality according to their sympathies for the litigants. The Seventh Circuit in *Ivanov-McPhee* does state that it will consider whether "the appellant's interests will be seriously undermined by dismissal of the appeal," but this is mere dicta since the court found that Rule 54(b) did apply, and it was therefore without jurisdiction. 719 F.2d at 930.

The Tenth Circuit also announces that it "cannot accept the absolute language of *Firestone* as applicable to all rulings concerning jurisdiction." 835 F.2d at 246. This, the court reasoned, is because, "The Court in *Marathon*, when faced with more compelling facts, retreated from an absolute prohibition against prospective jurisdictional holdings." *Id.* at 247 (citing *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)). This reasoning overlooks the fact that the bankruptcy courts in *Marathon* were not without jurisdiction, but rather, the congressional grant of jurisdiction did not comply with Article III requirements. *Marathon* is not a jurisdictional ruling, but constitutional. Therefore, *Firestone* has no application to *Marathon* and cannot be deemed to be modified by *Marathon*.

*Firestone* is directly on point with the present case and expressly prohibits the actions of the circuit court of appeals. The Tenth Circuit's claim that it is merely "rulemaking" trivializes the jurisdictional nature of the finality requirement and at-

tempts to circumvent the fundamental principle that no court may hear a case over which it lacks subject matter jurisdiction.

## CONCLUSION

The issue of the finality of orders in consolidated actions is a recurring question over which the circuit courts have divided three ways. The decision of the Tenth Circuit challenges several fundamental constitutional principles. The court asserts that finality is "discretionary," that a lack of subject matter jurisdiction may be outweighed by prudential concerns, and that jurisdictional rulings may be applied prospectively only. Furthermore, the court has directly defied the mandate of *Firestone*. For these reasons, a Writ of Certiorari should issue to the Tenth Circuit Court of Appeals so that this Court may properly address this jurisdictional issue.

Respectfully submitted,

SNEED, LANG, ADAMS,
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By _____

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## APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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FILED
United States Court of Appeals
Tenth Circuit
AUG 26 1987
ROBERT L. HOECKER
Clerk

**No. 86-2118**

TRINITY BROADCASTING CORPORATION,
a Michigan corporation
Plaintiff-Appellant

*v.*

LEE R. ELLER; LEECO OIL,
an Oklahoma corporation
Defendants

REECE MORREL; DONALD HERROLD;
and J. CHARLES SHELTON,
Defendants-Appellees

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**Appeal from the United States District Court**
**for the Northern District of Oklahoma**
**(D.C. No. 82-C-1188)**
**(Consolidated)**

---

Submitted on the briefs:

Steven J. Berg of Briggs, Patterson, Eaton & Berg, Tulsa, Oklahoma, for Plaintiff-Appellant.

James C. Lang, Brian S. Gaskill, and Melinda J. Martin of Sneed, Lang, Adams, Hamilton, Downie & Barnett, Tulsa, Oklahoma, for Defendants-Appellees.

Before LOGAN and TACHA, Circuit Judges, and O'CONNOR, District Judge.*

PER CURIAM.

*The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

After examinging the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

On July 23, 1986, plaintiff filed a notice of appeal from the district court's entry of summary judgment in favor of some defendants, as well as from the denial of plaintiff's motion for reconsideration. Plaintiff's claims against two additional defendants in an action consolidated with the instant action remained pending. On August 14, 1986, the district court entered an order pursuant to Fed. R. Civ. P. 54(b) finding that there was no just reason for delay and determining that the summary judgment in the instant action was a final judgment. Plaintiff did not file a new notice of appeal.

We consider in this case an issue of first impression in this circuit, whether summary judgment in favor of the defendants in an original action operates as a final judgment when plaintiff's claims against defendants in another action which had been consolidated with the first are still pending. The matter is before us on our own motion, to determine whether this court has jurisdiction over the captioned appeal.

The Ninth Circuit has adopted an absolute rule that a judgment in a consolidated action that does not dispose of all claims is not final without a Rule 54(b) certification. *See Huene v. United States*, 743 F.2d 703 (9th Cir. 1984). Two other circuits have held that a judgment in one portion of a consolidated action is final and appealable regardless of the pendency of the other consolidated claims. *See In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir. 1972); *Kraft, Inc. v. Local Union 327, Teamsters*, 683 F.2d 131 (6th Cir. 1982). In contrast, other circuits have looked at the nature of the consolidation and the relationship of the consolidated actions. *Ivanov-McPhee v. Washington Nat'l. Ins. Co.*, 719 F.2d 927, 930 (7th Cir. 1983); *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982); *Jones v. Den Norske Amerikalinje A/S*, 451 F.2d 985, 986-87 (3d Cir. 1971).

We agree with the Ninth Circuit's approach, and adopt the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final, appealable judgment under 28 U.S.C. § 1291. To obtain review of one part of a consolidated action, appellant must obtain certification under Fed. R. Civ. P. 54(b). In this circuit, Rule 54(b) certification must precede filing of the notice of appeal. *See A.O. Smith Corp. v. Sims Consolidated Ltd.*, 647 F.2d 118, 121 (10th Cir. 1981); *but see Freeman v. Hittle*, 747 F.2d 1299, 1301 (9th Cir. 1984).

Our adoption of any other rule would lead to the same piecemeal review Rule 54(b) seeks to prevent. We reject the flexible approach of considering the nature of the consolidation in each individual case because "it is essential that the point at which a judgment is final be crystal clear because appellate rights depend upon it." *Huene*, 743 F.2d at 704. Moreover, the flexible approach makes the appellate court the arbiter of the

nature and purpose of consolidation, rather than the district court. The district court "is best able to assess the original purpose of the consolidation and whether an interim appeal would frustrate that purpose." *Id.*

We enunciate here a new rule for this circuit, in the context of differing rules in other circuits. Since plaintiff did not file a second notice of appeal following the district court's Rule 54(b) certification, our dismissal of this appeal would result in no hearing for plaintiff on the merits. Retroactive application of this rule thus would work a substantial inequity on the plaintiff. We decline to do so. *See Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1512 (10th Cir. 1987); *EEOC v. Gaddis*, 733 F.2d 1373, 1376 (10th Cir. 1984). Therefore, the district court's entry of summary judgment against plaintiff in the instant case will be considered final on the date it was entered. The plaintiff's timely notice of appeal from the district court's entry of summary judgment therefore confers appellate jurisdiction.

The appellant is directed to file his opening brief within thirty days of the date of this opinion.

## APPENDIX B

## No. 86-2118

United States Court of Appeals,
Tenth Circuit.

Dec. 9, 1987.

**TRINITY BROADCASTING CORPORATION,**
**Plaintiff-Appellant**

*v.*

**LEE R. ELLER; LEECO OIL,**
**an Oklahoma corporation**
**Defendants**

**REECE MORREL, DONALD HERROLD;**
**and J. CHARLES SHELTON**
**Defendants-Appellees**

Broadcasting corporation filed suit. Claims against two additional defendants were consolidated. The United States District Court for the Northern District of Oklahoma, H. Dale Cook, Chief Judge, entered summary judgment in favor of some defendants and denied broadcasting corporation's motion for reconsideration. Corporation filed notice of appeal. The Court of Appeals, 827 F.2d 673, held that judgment in consolidated action that did not dispose of all claims did not operate as final appealable judgment and that new rule was not retroactive. Defendants petitioned for rehearing with suggestion for rehearing en banc. The Court of Appeals, Logan, Circuit Judge, held that Court of Appeals' decision to hear appeal despite its decision that summary judgment was not appealable was not unlawful usurpation of congressional control over jurisdiction of inferior federal courts.

Rehearing and rehearing en banc denied.

Clark O. Brewster and Michael F. Kuzow of Brewster Shallcross Rizley & Mullon, Tulsa, Okl., for plaintiff-appellant.

James C. Lang, Brian S. Gaskill, Melinda J. Martin and Kirsten I. Bernhardt of Sneed, Lang, Adams, Hamilton & Barnett, Tulsa, Okl., for defendants-appellees.

Before LOGAN and TACHA, Circuit Judges, and O'CONNOR, District Judge.*

LOGAN, Circuit Judge.

Defendants-appellees Reece Morrell, Donald Herrold and J. Charles Shelton have petitioned for rehearing, with suggestion for rehearing en banc, of our decision in *Trinity Broadcasting Corporation v. Eller,* 827 F.2d 673 (10th Cir. 1987) (*Trinity I*). We there ruled that when independently filed actions have been consolidated for trial, an order of summary judgment disposing of one, but not all, of the claims or suits is not appealable unless and until the district court has certified the order as final pursuant to Fed.R.Civ.P. 54(b). In so holding we followed one among several conflicting interpretations of other circuits on the same issue. *See* 827 F.2d at 675. To avoid an unfairly harsh application, we declined to apply the rule retroactively to bar plaintiff-appellant Trinity Broadcasting Corporation's appeal. Instead, we held that "the district court's entry of summary judgment against plaintiff in the instant case will be considered final on the date it was entered." *Id.* We therefore found appellate jurisdiction and ordered the appeal to proceed.

Appellees urge us to reconsider that decision. They contend that our decision to hear the appeal would broaden the congressional grant of jurisdiction over appeals from the final decisions of district courts, 28 U.S.C. § 1291, and would contravene the

*The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

notion of limited jurisdiction in the inferior federal courts embodied in Article III of the United States Constitiution.

Appellees' argument relies principally upon language in *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). There, the Eighth Circuit had held that the denial of a motion to disqualify counsel did not constitute a final decision for purposes of 28 U.S.C. § 1291, but that the equities of the case—primarily that the holding overruled clear precedent—required a prospective application only. *In re Multi-Piece Rim Products Liability Litigation,* 612 F.2d 377, 379 (8th Cir.1980) (en banc), *rev'd sub nom. Firestone, supra.* In reversing, the Supreme Court stated:

> "[The Circuit's] approach, however, overlooks the fact that the finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. *A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.*"

*Firestone*, 449 U.S. at 379, 101 S.Ct. at 676 (emphasis added). We make a two-part response to the appellees' argument.

I

First, we cannot accept the absolute language of *Firestone* as applicable to all rulings concerning jurisdiction. In a post-*Firestone* opinion, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the Supreme Court, considered equitable factors in determining whether to apply prospectively a holding that Congress had vested jurisdiction in bankruptcy courts in violation of Article III. *Id.* at 87-88, 102 S.Ct. at 2880 (plurality

opinion; *see also* concurring opinion of Rehnquist, J., *id.* at 92, 102 S.Ct. at 2882).[1] Marathon did not mention *Firestone*. The critical distinguishing factor between the two cases might be the factual settings. In *Firestone* the Court's decision did not foreclose appeal, but merely delayed it until the lower court's disposition of the entire case, as the Supreme Court itself emphasized. 449 U.S. at 377-78, 101 S.Ct. at 675-76. The Court in *Marathon*, when faced with more compelling facts, retreated from an absolute prohibition against prospective jurisdictional holdings.

[1] *Marathon* implicitly recognizes a staple of Article III interpretation: Article III's jurisdictional limitation must be construed in light of all the competing constitutional and prudential values in a case. *Marathon* found the interests of congressional intent and judicial administration to have temporarily coequal status with subject matter jurisdiction. *See also Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376-77, 60 S.Ct. 317, 319-20, 84 L.Ed. 329 (1940) (need for finality bars collateral attack on erroneous jurisdictional ruling of federal court). The case before us invokes the litigant's interest in fair notice of rules which affect the conduct of a lawsuit—an interest which is protected by the Due Process Clause if a lack of notice deprives a party of its day in court. *Brinkerhoff-Faris Trust & Savings Co. v Hill,* 281 U.S. 673, 679-80, 50 S.Ct. 451, 453-54, 74 L.Ed. 1107 (1930).

*Marathon* looks to Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971), for a mechanism to balance jurisdictional consistency with competing values. *Chevron* sets forth

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[1] In fact, the Supreme Court decided *Marathon* in June but delayed the application of its jurisdictional holding until October. Thus, the Court not only gave its ruling a nonretroactive effect but also delayed the prospective effect.

> "three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question 'decide[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases; second, 'whether retrospective operation will further or retard [the] operation' of the holding in question; and third, whether retroactive application 'could produce substantial inequitable results' in individual cases."

*Marathon*, 458 U.S. at 88, 102 S.Ct. at 2880 (citations omitted). These considerations justify the nonretroactive application of our ruling in *Trinity I*. First, the finality of partial summary judgment in consolidated cases arose in *Trinity I*. as an issue of first impression in this circuit. Our holding was not clearly foreshadowed, insofar as the majority of circuits which had faced the issue had reached a result more sympathetic to an appellant than our holding. *See Trinity I*, 827 F.2d at 675 (discussing precedent from other circuits). Second, a retroactive holding which bars the appeal would defeat one of the primary purposes of the federal rules of civil and appellate procedure: the orderly presentation of appeals in an environment free of procedural complexity, confusion, and surprise. Finally, that appellant would lose its appeal forever[2] satisfies, by itself, *Huson*'s objective to avoid "substantial inequitable results."

II

[2] Appellees' argument also erroneously assumes that the courts have no discretion in determining "finality" for purposes

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[2] Trinity did not file a second notice of appeal following the district court's Rule 54(b) certification. If we treat the Rule 54(b) certification as making the judgment "final" within the meaning of 28 U.S.C. § 1291, the ten-day period for filing notices of appeal having expired, *see* Fed.R.App.P. 4(a)(1), Trinity will have lost its right to appeal unless we uphold the validity of the first notice of appeal.

of appellate jurisdiction. The law is to the contrary, particularly in the context of review during litigation that is ongoing. For instance, the district court, by its certification process pursuant to Fed.R.Civ.P. 54(b), can choose in a given case to create a "final" order which we must accept for review. Conversely, the district court may delay review of that order until the entire controversy is decided, by denying Rule 54(b) certification. Rule 54(b) assigns to the district court the duty to weigh "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Consversion Corp.*, 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299 (1950).

The courts of appeal likewise enjoy the power to establish and apply flexible rules of finality. Such power is exemplified by three decisions cited in *Trinity I*, in which other circuits contemplated the finality of partial summary judgment orders in consolidated cases. *Ivanov-McPhee v. Washington National Insurance Co.*, 719 F.2d 927, 930 (7th Cir.1983); *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir.1982); *Jones v. Den Norske Amerikalinje A/S*, 451 F.2d 985, 986-87 (3d Cir.1971). All three of these circuits decided that the finality of such orders must be determined on a case-by-case basis, taking into account the nature of the consolidation and the relationship of the consolidated actions. Thus, these three circuits have reserved for themselves the type of discretionary power over finality determinations which we, in *Trinity I*, ceded prospectively to the district courts to be exercised pursuant to Rule 54(b) certification.

[3] We have no doubt of the legality of the Third, Fifth and Seventh Circuits' approach. The need for a flexible interpretation of § 1291's rule of finality was recognized in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13

L.Ed. 2d 199 (1964), in which the Supreme Court held that the "requirement of finality is to be given a 'practical rather than a technical construction.' " *Id.* at 152, 85 S.Ct. at 311 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949)). This is not to say that these other circuits' decisions are the wisest approach; in *Trinity I* we decided that for reasons of judicial economy, determinations of finality in these cases should remain the sole province of district courts. But *Trinity I* was a prudential holding, not mandated by precedent in the Supreme Court or our circuit, by statute, or by the Constitution. From this recognition flows a fair rebuttal to appellees' argument: Because, like the other circuits, we could have exercised on an ongoing basis the power to determine the finality of a grant of summary judgment in one of multiple consolidated cases, we can exercise such power on a one-time basis before permanently assigning such power to the district courts on an exclusive basis.

[4] Far from being "jurisdictional" and subject to Article III limitations, the decision whether to hear the appeal in the circumstances before us is for this court to determine subject only to the overriding authority of the Supreme Court or Congress. Thus, we do not see our ruling as an unlawful usurpation of Congress' control over the jurisdiction of inferior federal courts as expressed in 28 U.S.C. § 1291. *Cf. Campos v. LeFevre,* 825 F.2d 671, 676 (2d Cir.1987) (giving prospective-only effect to new practice of dismissing untimely appeals when no motion for extension of time has been filed under Fed.R.App.P. 4(a)). Rather, we are exercising a prudential and constitutional measure of discretion over the retroactive impact of our new holding, so that technical barriers will not deprive appellant of its appeal. We adhere to our decision in *Trinity I.*

The petition for rehearing is DENIED by the panel to whom the case was argued and submitted. Because no member of the panel nor judge in regular active service on the court has requested that the court be polled on rehearing en banc, *see* Fed.R.App. P. 35(b), the suggestion for rehearing en banc is DENIED.

**APPENDIX C**

# UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

CLERK'S OFFICE

UNITED STATES COURT HOUSE

TULSA, OKLAHOMA 74103

JACK C. SILVER
CLERK

August 15, 1986

(918) 581-7796
(FTS) 736-7796

TO: COUNSEL/PARTIES OF RECORD

RE: Case # 83-C-1188
Trinity Broadcasting Corp. vs. Reece Morrel, Donald Herrold and J. Charles Shelton

This is to advise you that Chief Judge H. Dale Cook entered the following Minute Order this date in the above case:

> On April 25, 1986 this Court entered its Order sustaining defendants Morrel, Herrold, and Shelton's motion for summary judgment and entered Judgment in their favor. Pursuant to Rule 54(b) F.R.Cv.P. the Court finds that there is no just reason for delay and the Court determines that the Judgment entered on April 25, 1986 in favor of defendants Morrel, Herrold, and Shelton and against Trinity Broadcasting Corp. is a final judgment.

Very truly yours,

JACK C. SILVER, CLERK

By: S/S P. Irving
Deputy Clerk

# APPENDIX D

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Rule 54(b) of the *Federal Rules of Civil Procedure* provides:

**(b) Judgment upon multiple claims or involving multiple parties**

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 42(a) of the *Federal Rules of Civil Procedure* provides:

**(a) Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.